Syarikat Ibraco-Peremba Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01–177–04 OF 2013
ABDUL WAHAB PATAIL, LINTON ALBERT AND UMI KALTHUM JJCA
29 MAY 2014

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Revenue Law — Income tax — Avoidance — Appellant sold its land to subsidiary company — Appellant entered contract with subsidiary company to develop land — Appellant sold its shares in subsidiary company — Subsidiary company sold developed land to third parties — Subsidiary company wound up — Respondent assessed tax on appellant's net profit — Respondent raised additional assessment against appellant — Whether there was tax avoidance by appellant pursuant to s 140 of the Income Tax Act 1967 — Whether penalty under s 113(2) of the Act automatically imposed on appellant by respondent — Income Tax Act 1967 ss 113 & 140

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The appellant, a property development company intended to build shop houses and complex on land ('the land') located in Kuching and had since sought the advice from Arthur Andersen HRM (Tax Service) Sdn Bhd ('Arthur Andersen'). Acting on the advice of Arthur Andersen, the appellant had on 5 January 1994 incorporated a subsidiary company known as Ibraco-Peremba Holdings Sdn Bhd ('IPH') and sell the land to IPH ('the first transaction'). The appellant and IPH then entered into a Turnkey construction contract for the appellant to develop the land ('the project'). The project was completed by the appellant in 1996. In year 2003, the appellant sold its shares in IPH to Vendu Sdn Bhd ('Vendu') ('the second transaction') and subsequently, IPH sold the land together with the completed commercial buildings ('the properties') to third parties ('the third transaction') and realising a gain of RM16.9m. After the sale of the properties, both Vendu and IPH were then voluntarily wound up. The case before the Special Commissioners of Income Tax ('SCIT'), the High Court and the present court revolved around the assessment of tax by the respondent against the appellant on the net profit of the appellant. At first, the respondent determined the profit gained from the disposal according to the value of the transfer of the appellant's share in IPH to Vendu but subsequently, the respondent issued a reduced assessment after the method in determining the profit had been reviewed. However, later on, the respondent raised additional assessment on the profit of RM16.9m, hence the case before the SCIT. At the end of the hearing, the SCIT found that the respondent was right to invoke s 140 of the Income Tax Act 1967 ('the Act') and to impose the tax on such transaction. It was further found that the imposition of penalty by the

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respondent under s 113(2) of the Act was correct in law and hence, the SCIT dismissed the appellant's appeal ('the deciding order'). The appellant's appeal against the deciding order was later dismissed by the High Court, hence the present appeal. The appellant submitted that, in order for s 140 of the Act to have any application, there has to be 'a transaction', which may consist of several legal documents and 'sub-transactions' which may have been a 'preordained series of transactions'. It was therefore submitted that the second and third transactions could not be said to be 'preordained' particularly where the said transactions were separated in time by nine years. Further, it was the appellant's contention that in looking at tax avoidance scheme which comprised a number of specific transactions to avoid tax, the genuineness or otherwise of each individual step or transaction need not be looked at from each individual step or transaction but it was to be looked at as a whole. On the other hand, the respondent submitted that the facts clearly showed that the scheme adopted by the appellant did not fall within the meaning of organising its affairs so as to minimise tax but in fact, it was a tax avoidance scheme which must fall within the scope of s 140 of the Act. With regards to penalty under s 113(2) of the Act, the appellant had raised the issue of whether the respondent was in error in subjecting the appellant to penalties under s 113(2) of the Act before the High Court, but which was not dealt with explicitly by the learned High Court judge. On this issue, the appellant submitted that the SCIT had erred in their interpretation of s 113(2) of the Act in holding that 'good faith' was not a defence. The appellant also submitted that as s 140 of the Act did not provide for penalty, the respondent was therefore precluded from invoking it under s 113(2) of the Act.

Held, dismissing the appeal with costs of RM10,000; and affirming the decision of the learned High Court judge:

(1) Based on the factual matrix of this case the learned High Court judge was not wrong in coming to her conclusion that the facts found by the SCIT showed that there was tax avoidance when the transactions entered into by the appellant through shelf companies revealed the factual situation that the tax position was altered; that the SCIT found that the appellant had in fact implemented a scheme following the advice of the tax consultant in perpetuating one original intention of selling of the properties as it intended to do from the start (see para 30).

(2) The court agreed with the learned High Court judge that in looking at tax avoidance scheme which comprised a number of specific transactions to avoid tax, the genuineness or otherwise of each individual step or transaction need not be looked at from each individual step or transaction but it is to be looked at as a whole. As such there was no error committed by the SCIT to warrant court's intervention as there were

evidence and facts to support the findings of the SCIT in arriving at the decision they did and hence justifying a case under s 140 of the Act (see para 31).

(3) The court accepted the SCIT's findings of facts that the so-called second and third transactions were in discharge of the scheme advanced by Arthur Andersen as a way of avoiding tax by the appellant, notwithstanding the long passage of time (see para 32).

(4) Subsection 113(1) of the Act provides for an offence being committed in the circumstance provided for in para (a) or (b) unless that person 'satisfies the court that the incorrect return or incorrect information was made or given in food faith'. Whereas sub-s 113(2) of the Act provides for a situation where there is no prosecution under sub-s 113(1) has been instituted in the circumstances provided for in paragraphs (a) or (b) of s 113(2) of the Act, the Director General may require that person to pay a penalty. That being the case, the defence of 'good faith' as found in sub-s 113(1), and not found in sub-s 113(2), does not apply to the Director General's discretion under sub-s 113(2) (see para 38).

(5) It is self-evident that s 140 of the Act does not expressly nor impliedly exclude the operation of s 113 of the Act. Section 113 of the Act therefore operated in the circumstances of the case independent of s 140 of the Act. Hence, the respondent had not erred in invoking s 113(2) of the Act against the appellant (see para 39).

[Bahasa Malaysia summary

Perayu, syarikat pembangunan hartanah berhasrat untuk membina rumah kedai dan kompleks atas tanah tersebut ('tanah tersebut') yang terletak di Kuching dan telahpun meminta nasihat daripada Arthur Andersen HRM (Tax Service) Sdn Bhd ('Arthur Andersen'). Bertindak atas nasihat Arthur Anderson, perayu telah pada 5 Januari 1994 memperbadankan syarikat subsidiari dikenali sebagai Ibraco-Peremba Holdings Sdn Bhd ('IPH') dan menjual tanah tersebut kepada IPH ('transaksi pertama'). Perayu dan IPH kemudian memasuki kontrak pembinaan serah kunci untuk perayu memajukan tanah tersebut ('projek tersebut'). Projek tersebut telah disiapkan oleh perayu pada 1996. Pada tahun 2003, perayu telah menjual sahamnya dalam IPH kepada Vendu Sdn Bhd ('Vendu') ('transaksi kedua') dan berikutan itu, IPH telah menjual tanah tersebut bersama bangunan komersial yang siap ('hartanah tersebut') kepada pihak ketiga ('transaksi ketiga') dan merealisasikan keuntungan RM16.9 juta. Selepas jualan hartanah tersebut, kedua-dua Vendu dan IPH kemudian secara suka rela digulungkan. Kes di hadapan Pesuruhjaya Khas Cukai Pendapatan ('PKCP'), Mahkamah Tinggi dan mahkamah ini berkisarkan taksiran cukai oleh responden terhadap perayu tentang keuntungan bersih perayu. Pada mulanya, responden menentukan keuntungan yang diperoleh daripada jualan menurut nilai pemindahkan saham perayu dalam IPH kepada Vendu tetapi

kemudian, responden telah mengeluarkan taksiran yang dikurangkan selepas cara menentukan keuntungan dikaji semula. Walau bagaimanapun, berikutan itu, responden telah meningkatkan taksiran tambahan kepada keuntungan RM16.9 juta, justeru kes di hadapan PKCP. Di akhir perbicaraan, PKCP mendapati bahawa responden wajar menggunakan s 140 Akta Cukai Pendapatan 1967 ('Akta tersebut') dan untuk mengenakan cukai ke atas transaksi tersebut. Ia selanjutnya didapati bahawa pengenaan penalti oleh responden di bawah s 113(2) Akta tersebut adalah betul dari segi undang-undang dan justeru, PKCP telah menolak rayuan perayu ('perintah keputusan'). Rayuan perayu terhadap perintah keputusan itu kemudian telah ditolak oleh Mahkamah Tinggi, justeru rayuan ini. Perayu berhujah bahawa, bagi tujuan s 140 Akta tersebut mempunyai apa-apa pemakaian, perlu ada 'a transaction', yang boleh mengandungi beberapa dokumen sah dan 'sub-transactions' yang merupakan 'preordained series of transactions'. Oleh itu dihujahkan bahawa transaksi kedua dan ketiga tidak boleh dikatakan 'preordained' khususnya di mana transaksi-transaksi tersebut terpisah dalam masa sembilan tahun. Selanjutnya, ia adalah hujah perayu bahawa dengan melihat kepada skim mengelakkan cukai yang terdiri daripada beberapa urusniaga tertentu untuk mengelakkan cukai, ketulenan atau sebaliknya setiap langkah individu atau transaksi tidak perlu dilihat dari setiap langkah individu atau transaksi tetapi ia adalah untuk melihat secara keseluruhan. Sebaliknya, responden berhujah bahawa fakta jelas menunjukkan bahawa skim yang diguna pakai oleh perayu tidak terangkum dalam maksud menguruskan hal ehwalnya untuk mengurangkan cukai tetapi sebenarnya, ia adalah skim mengelak dikenakan cukai yang mesti termasuk dalam skop s 140 Akta tersebut. Berhubung penalti di bawah s 113(2) Akta tersebut, perayu telah menimbulkan isu sama ada responden berlaku salah kerana mengenakan ke atas perayu penalti di bawah s 113(2) Akta tersebut di hadapan Mahkamah Tinggi tetapi yang tidak dikendalikan secara ekplisit oleh hakim Mahkamah Tinggi yang bijaksana. Berhubung isu ini, perayu berhujah bahawa PKCP terkhilaf dalam penafsiran s 113(2) Akta tersebut kerana memutuskan bahawa 'good faith' bukan satu pembelaan. Perayu juga berhujah bahawa oleh kerana s 140 Akta tersebut tidak memperuntukkan untuk penalti, responden dengan itu dikecualikan daripada menggunakannya di bawah s 113(2) Akta tersebut.

Diputuskan, menolak rayuan dengan kos RM10,000; dan mengesahkan keputusan hakim Mahkamah Tinggi yang bijaksana:

(1) Berdasarkan matriks faktual kes ini hakim Mahkamah Tinggi yang bijaksana tidak terkhilaf dalam kesimpulan beliau bahawa fakta tersebut didapati oleh PKCP menunjukkan terdapat pengelakan cukai apabila transaksi-transaksi tersebut yang dimasuki oleh perayu melalui syarikat-syarikat sedia ada mendedahkan keadaan sebenar yang kedudukan cukai telah diubah; bahawa PKCP mendapati bahawa perayu sebenarnya telah melaksanakan skim itu berikutan nasihat perunding

cukai dalam mengekalkan satu niat asal untuk menjual hartanah sepertimana ia bertujuan untuk melakukan dari awal (lihat perenggan 30).

(2) Mahkamah bersetuju dengan hakim Mahkamah Tinggi yang bijaksana bahawa dengan melihat kepada skim pengelakan cukai yang terdiri daripada sebilangan transaksi spesifik untuk mengelak cukai, ketulenan atau jika tidak, setiap langkah individu atau transaksi tidak perlu dilihat dari setiap langkah individu atau transaksi tetapi ia adalah untuk dilihat secara keseluruhan. Oleh itu tiada kesilapan dilakukan oleh PKCP untuk mewajarkan campur tangan mahkamah kerana terdapat keterangan dan fakta untuk menyokong dapatan PKCP untuk membuat keputusannya dan justeru mewajarkan kes di bawah s 140 Akta tersebut (lihat perenggan 31).

(3) Mahkamah menerima dapatan fakta PKCP bahawa transaksi kedua dan ketiga yang dikatakan itu dilakukan berdasarkan skim yang dikemukakan oleh Arthur Anderson sebagai satu cara untuk mengelak cukai oleh perayu, walau apa pun tempoh perjalanan yang lama (lihat perenggan 32).

(4) Subseksyen 113(1) Akta tersebut memperuntukkan bagi kesalahan yang dilakukan dalam keadaan yang diperuntukkan dalam perenggan (a) atau (b) kecuali jika orang itu 'satisfies the court that the incorrect return or incorrect information was made or given in food faith'. Manakala sub-s 113(2) Akta tersebut memperuntukkan keadaan di mana tidak ada pendakwaan di bawah sub-s 113(1) yang telah dimulakan dalam keadaan yang diperuntukkan dalam perenggan (a) atau (b) kepada s 113(2) Akta tersebut, Ketua Pengarah boleh menghendaki orang itu membayar penalti. Jika itu kesnya, pembelaan 'good faith' seperti didapati dalam sub-s 113(1), dan bukan yang didapati dalam sub-s 113(2), tidak terpakai kepada budi bicara Ketua Pengarah di bawah sub-s 113(2) (lihat perenggan 38).

(5) Ia dengan sendiri jelas bahawa s 140 Akta tersebut tidak secara nyata atau tersirat mengecualikan operasi s 113 Akta tersebut. Seksyen 113 Akta tersebut dengan itu beroperasi dalam keadaan kes berasingan s 140 Akta tersebut. Justeru, responden tidak terkhilaf dalam menggunakan s 113(2) Akta tersebut terhadap perayu (lihat perenggan 39).]

Notes

For a case on avoidance, see 10(2) *Mallal's Digest* (5th Ed, 2015) para 2618.

Cases referred to

Chua Lip Kong v Director-General of Inland Revenue [1982] 1 MLJ 235, PC (refd)

Commissioner of Inland Revenue v Challenge Corporation Ltd [1986] STC 548, PC (refd)
Director-General of Inland Revenue v Rakyat Berjaya Sdn Bhd [1984] 1 MLJ 248, FC (refd)
Edwards (HM Inspector of Taxes) v Bairstow & Harrison 36 TC 207; [1956] AC 14, HL (refd)
Ensign Tankers (Leasing) Ltd v Stokes (Inspector of Taxes) [1992] 1 AC 655, HL (refd)
Furniss (Inspector of Taxes) v Dawson and related appeals [1984] STC 153, HL (refd)
Inland Revenue Commissioners v Duke of Westminster [1936] AC 1, HL (refd)
Ketua Pengarah Hasil Dalam Negeri v Kim Thye & Co [1992] 2 MLJ 708; [1992] 1 CLJ Rep 135, SC (refd)
Lauri Joseph Newton and others v Commissioner of Taxation of The Commonwealth of Australia [1958] AC 450, PC (refd)
Lower Perak Co-Operative Housing Society Bhd v Ketua Pengarah Hasil Dalam Negeri [1994] 2 MLJ 713; [1994] 3 CLJ 541, SC (refd)
Sabah Berjaya Sdn Bhd v Ketua Pengarah Jabatan Hasil Dalam Negeri [1999] 3 MLJ 145, CA (refd)
Simmons (as liquidator of Lionel Simmons Properties Ltd) v Inland Revenue Commissioners [1980] STC 350, HL (refd)
WT Ramsay Ltd v Inland Revenue Commissioners; Eilbeck (Inspector of Taxes) v Rawling [1981] 1 All ER 865; [1982] AC 300, HL (refd)

Legislation referred to

Income Tax Act 1967 ss 113, 113(1), (1)(a), (1)(b), (2), (2)(a), (2)(b), 140, 140(1)(a), (1)(c)
Income Tax Act 1976 [NZ] s 99
Interpretation Acts 1948 and 1967 s 17A
Real Property Gains Tax Act 1976 Second Schedule, para 34A
Real Property Gains Tax (Exemption) (No 2) Order 2003

Appeal from: Appellate and Special Powers Division No R2–14–17 of 2011 (High Court, Kuala Lumpur)

WSW Davidson (Francis Tan and Cheah Keng Soon with him) (Azman Davidson & Co) for the appellant.
Abu Tariq Jamaluddin (Ashrina Ramzan Ali and Hasniza Alias with him) (Inland Revenue Board of Malaysia) for the respondent.

Umi Kalthum JCA:

[1] This is an appeal to this court by the appellant against the decision of the High Court dated 5 April 2013 in respect of the appellant's requisition against the deciding order by the Special Commissioners of Income Tax ('SCIT').

FACTS

[2] The brief facts of the case as found by the SCIT (para 6(a)–(r), case stated, pp 32–35, *RR Bahagian* A and B) are as follows:

(a) the appellant is a property development company. The appellant buys land, develops the land and sells them. Any profits arising therefrom are regarded as business income and are subjected to income tax under the Income Tax Act 1967 ('the Act');

(b) sometime in 1992, the appellant identified the properties held under Lots 8874–8918, Muara Tebas Land District, Bandar Kuching ('the land') as being suitable for long term investment. It intended to build shophouses and complex on the land in its entirety or in units. The appellant also planned to build shophouses on another lot of land with the objective of leasing out the shophouses for a period of time prior to sale (the land together with the completed commercial buildings hereinafter referred to as 'the properties');

(c) the appellant sought the advice from Arthur Andersen HRM (Tax Services) Sdn Bhd ('Arthur Andersen'). The advice received was to the effect that the appellant should set up a subsidiary and thereafter sell the land to the subsidiary;

(d) based on the advice, the appellant formed a realty company Ibraco-Peremba Holdings Sdn Bhd ('IPH'). IPH was a wholly owned subsidiary of the appellant and it was incorporated on 5 January 1994. The principal activity of IPH was investment holding and property developer;

(e) Ibraco Bhd ('Ibraco') held 60.5% shares in Vendu Sdn Bhd ('Vendu') while another 39.5% was held by Peremba Holdings Sdn Bhd ('Peremba');

(f) after the sale of the land by the appellant to IPH, IPH entered into the Turnkey construction contract on 27 August 1994 with the appellant to develop the land;

(g) the project was completed around the year 1996. It comprised of 23 shophouses, one shopping complex known as Wisma Wan and one office building known as Ibraco House. Apart from that, based on IPH audited account for year ending 31 January 1997, IPH fixed asset was valued at RM13,422,700;

(h) after the completion of the said project, it was rented out and rental income was declared as IPH business income;

(i) pursuant to a corporate restructuring exercise, the appellant sold the shares in IPH to Vendu on 11 June 2003. The shareholders of Vendu

were Ibraco, a related company of the appellant, and Peremba. The ratio of shareholding was 60.5% and 39.5% respectively;

(j) from the respondent's data base system, the directors of Vendu were:

(i) Ravindranatham a/l KP Kasavapillai (employee of Peremba Development Sdn Bhd) and holds 39.5% of share holding;

(ii) Vijayalingam a/l Vythilingam; and

(iii) Angela Liew Siaw Fan (employee of Ibraco) and holds 60.5% of share holding;

(k) on 11 June 2003, the appellant disposed its shares in IPH to Vendu for the consideration of RM22.5m;

(l) after the change in shareholdings in IPH, IPH sold 'the properties' in 2003 and 2004 realising a gain of RM16.9m;

(m) initially, the profit from the said disposal was determined based on the value of the transfer of the appellant's share in IPH to Vendu, that is, RM22.5m by deducting the investment cost incurred by the appellant in IPH, that is, RM5.6m. Hence, the net income was RM16.9m;

(n) after reviewing the abovesaid basis, the respondent reviewed the method in determining the profit, which was based on the total value of the said disposal, that is, RM29,140,000 by deducting the development cost incurred on the project, that is, RM15,621,380. By applying the new method, the net profit of the appellant from the said proposal was RM13,518,620;

(o) in conjunction with that, the respondent had later issued a reduced assessment dated 16 January 2008 against the appellant which stated that the amount of RM1,893,572.80 had been discharged;

(p) on 30 November 2006 the respondent raised the additional assessment on the profit or surplus of RM16.9m. The appellant appealed to the SCIT for determination;

(q) through its resolution, IPH was voluntarily wound up; and

(r) Vendu too was voluntarily wound up and upon liquidation, all of Vendu's assets were passed to its shareholders who were nominees of Ibraco and Peremba.

CONTENTIONS BEFORE SCIT

[3] Before the SCIT, the appellant contended that it had disposed of only the land upon which was constructed 23 shoplots, Wisma Wan and Ibraco House and that it had only sold 5,600,000 shares in IPH. The disposal of shares

in IPH was a realisation of investment and not an adventure in the nature of trade or trading. If there is a liability to tax it should be on the gain arising from the disposal of shares in a real property company, pursuant to para 34A of the Real Property Gains Tax Act 1976 ('the RPGT Act'). Further, the sale was at market value.

[4] The appellant further contended that it should not be held liable to pay tax on the profit made by its subsidiary, otherwise the appellant would then be liable to pay tax twice — once when it sold the land to IPH in 1994 and then again be responsible for tax of IPH. The appellant contended that the respondent was not justified in invoking s 140 of the Act.

[5] The respondent contended that the appellant should be taxed under the Act in respect of the proceeds from the disposal of the commercial buildings which contained 23 shoplots, Wisma Wan and Ibraco House which had been developed by the appellant. The assessment was not raised on the disposal of shares in IPH. It was submitted that based on the facts and the law, the respondent had correctly exercised his discretion to invoke s 140 of the Act, where disposal of the land to IPH had been disregarded under that section and adjustment was made to bring to tax all proceeds from the disposal of the properties as income of the appellant. The respondent had also correctly exercised his discretion to impose penalty under s 113(2) of the Act.

[6] After a full hearing, the SCIT decided that the respondent was right to invoke s 140 of the Act and to impose the tax on such transaction. The SCIT also decided that the imposition of the penalty by the respondent under s 113(2) of the Act was correct in law and had unanimously dismissed the appellant's appeal ('the deciding order'). The appellant then appealed to the High Court against the deciding order.

APPEAL AT THE HIGH COURT

[7] On appeal to the High Court, the deciding order of the SCIT was upheld and the appeal of the appellant was dismissed. The learned High Court judge ruled that the facts found by the SCIT were unassailable on appeal and it could not be overruled or supplemented except in certain circumstances. The learned judge held that there was no error committed by the SCIT to warrant interference of the High Court as there were evidence and facts to support the findings of the SCIT in arriving at their decision.

[8] The appellant now appeals to this court.

A THE APPEAL

Role of an appellate court in a tax appeal

[9] Before addressing the appeal at hand, we remind ourselves on the B position of law on the role of an appellate court in a tax appeal based on decided cases. Counsel for the respondent had cited *Chua Lip Kong v Director-General of Inland Revenue* [1982] 1 MLJ 235; *Edwards (HM Inspector of Taxes) v Bairstow & Harrison* 36 TC 207; [1956] AC 14 and *Lower Perak Co-Operative Housing Society Bhd v Ketua Pengarah Hasil Dalam Negeri* [1994] 2 MLJ 713; C [1994] 3 CLJ 541 to this end. The Supreme Court in *Lower Perak Co-Operative Housing Society Bhd* had adopted the principles enunciated by Lord Radcliffe in *Edwards (HM Inspector of Taxes) v Bairstow & Harrison* 36 TC 207; [1956] AC 14 regarding the duty of the court when hearing appeals from Commissioners in tax cases, at p 35, as follows:

D > ... When the case comes before the Court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the *case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie it may be that the facts found are such that no person acting judicially and properly instructed* E *as to the relevant law could have come to the determination under appeal. In those circumstances, too, the Court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been error in point of law*. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is F inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are G likely to be neutral in themselves, and only to take their colour from the combination of circumstances in which they are found to occur.

We do not wish to add further to that enunciation on the principles of law on the subject. We, however, would like to note the principles as enunciated by the Privy Council in *Chua Lip Kong v Director-General of Inland Revenue* [1982] 1 H MLJ 235 at p 236 para B, left, with regard to the findings of facts by the SCIT as follows:

> Their Lordships cannot stress too strongly how important it is that, in every case stated for the opinion for the opinion of the High Court, the Special Commissioners should state clearly and explicitly what are the findings of fact upon I which their decision is based and not the evidence upon which those findings, so far

as they consist of primary facts, are founded. Findings of primary facts by the Special Commissioners are unassailable. They can be neither overruled nor supplemented by the High Court itself; occasionally they may be insufficient to enable the High Court to decide the question of law sought to be raised by the case stated, but in that event it will be necessary for the case to be remitted to the Commissioners themselves for further findings. It is the primary facts so found by the Commissioners that they should set out in the case stated as having been 'admitted and or proved'.

[10] Bearing in mind these principles, we now come to our decision on the appeal.

ISSUES

[11] Before us, the appellant had raised two issues, namely:

(a) whether s 140(1)(a) of the Act applied to the appellant; and

(b) whether the penalty under s 113(2) of the Act was automatically imposed on the appellant by the respondent.

SECTION 140(1)(a)

The appellant's case

[12] The appellant raised the arguments that s 140 of the Act was not applicable to the appellant and the appellant was not liable to pay the tax of its former subsidiary and that it had not undertaken tax avoidance exercise thereby enabling the respondent to invoke this section.

[13] To illustrate its arguments the appellant in its written submission drew up a diagram in Appendix A showing there were three transactions involving the properties. The first transaction was for the sale of the land from the appellant to its own subsidiary IPH, pursuant to Scenario B of Arthur Andersen's advice. This transaction took place in 1994. In the same year, IPH entered into a Turnkey construction contract with the appellant to develop the land ('the project'). The costs were based on actual costs of development and construction up to completion together with a 6.5% management fee. The project was completed in 1996. Upon the completion of the project the buildings were rented and rental income was declared as business income of IPH. When the land were sold to IPH in 1994, the appellant ceased to be owners of the land. Therefore the later transactions, that is, the second and third transactions were not at all within the contemplation at that time. The second and third transactions were separated in time from the first transaction by about nine years.

[14] The second transaction was when the appellant sold its shares in IPH to Vendu on 11 June 2003 for the sum of RM22.5m. The appellant's explanation for this course of action was that it had sought to have its shares listed in the Kuala Lumpur Stock Exchange through a newly set up holding company Ibraco Bhd. Upon advice from its financial advisers, that IPH should be excluded from the listing scheme to avoid adverse effect on the price of the listed shares, it was decided that IPH needed to cease to be a wholly owned subsidiary of the appellant. However, payment for the shares was deferred and evidenced by promissory notes. It was not disputed that the beneficial owner of Vendu were the same persons as were the owners of the appellant's shares prior to the listing.

[15] Further, for the purpose of tax, the sale of the IPH shares would be classified as a sale of a chargeable asset pursuant to para 34A of the Second Schedule to the RPGT Act. However, the RPGT Act was suspended from its application from 1 June 2003–31 May 2004 vide Real Property Gains Tax (Exemption) (No 2) Order 2003. This meant that vendors of chargeable assets (namely the appellant) within the meaning if the RPGT Act were entirely fee to dispose of their assets without the gain being subjected to tax. If a person took advantage of this suspension (as did the appellant it was argued) to dispose of chargeable assets and avoid paying tax, this is a clear example of permissable tax mitigation and the respondent had no right to seek to recover the revenue thereby lost by invoking s 140 of the Act.

[16] The third transaction was the sale of the properties by IPH to third parties unrelated to the appellant in August 2003–July 2004. IPH and Vendu were then voluntarily wound up after the sale of the properties had been completed. It was the appellant's contention that the voluntary winding up of IPH and Vendu were natural processes whereby when IPH (now a subsidiary of Vendu) had sold all its properties, it was wound up. The assets of IPH consisting of the proceeds from the sale then passed to Vendu which in turn used the money to pay the appellant for the IPH shares sold by the appellant to Vendu but which Vendu had not paid for the shares yet.

[17] It was further submitted that the appellant was entitled to minimise the tax to be paid to the respondent if the appellant was able to manage to organise it business to that effect. The appellant referred to the New Zealand case of *Commissioner of Inland Revenue v Challenge Corporation Ltd* [1986] STC 548 at p 554 (which involved the interpretation of s 99 of the New Zealand Income Tax Act 1976 which is in pari materia with s 140 of the Act), per Lord Templeman:

> The material distinction in the present case is between tax mitigation and tax avoidance. A taxpayer has always been free to mitigate his liability to tax. In the oft

quoted words of Lord Tomlin in *IRC v Duke of Westminster* [1936] AC 1 at p 19; 19 TC 490 at p 520.

Every man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Act is less than it otherwise would be'. In that case however the distinction between tax mitigation and tax avoidance was neither considered nor implied.

Income tax is mitigated by a taxpayer who reduces his income or incurs expenditure in circumstances which reduce his assessable income or entitle him to reduction in his tax liability. Section 99 of the New Zealand Income Tax Act 1976 does not apply to tax mitigation because the taxpayer's tax advantage is not derived from an 'arrangement' but from the reduction of income which he accepts or the expenditure which he incurs.

[At p 555] Section 99 of the New Zealand Income Tax Act 1976 does not apply to tax mitigation where the taxpayer obtains a tax advantage by reducing his income or by incurring expenditure in circumstances in which the taxing statute affords a reduction in tax liability.

[18] Further references were made to *Director-General of Inland Revenue v Rakyat Berjaya Sdn Bhd* [1984] 1 MLJ 248 (FC); *Sabah Berjaya Sdn Bhd v Ketua Pengarah Jabatan Hasil Dalam Negeri* [1999] 3 MLJ 145 (CA); *Lauri Joseph Newton and others v Commissioner of Taxation of The Commonwealth of Australia* [1958] AC 450 (PC); *Furniss (Inspector of Taxes) v Dawson and related appeals* [1984] STC 153 (HL); *Ensign Tankers (Leasing) Ltd v Stokes (Inspector of Taxes)* [1992] 1 AC 655 (HL); *Simmons (as liquidator of Lionel Simmons Properties Ltd) v Inland Revenue Commissioners* [1980] STC 350; *Lower Perak Co-Operative Housing Society Bhd v Ketua Pengarah Hasil Dalam Negeri*. These cases were cited by the appellant to support its contention that for s 140 to have any application there has to be 'a transaction', which may consist of several legal documents and 'subtransactions' which must have been a 'preordained series of transactions'. In the context of this case, the word 'preordained' implied that the second and the third transactions must have been in the mind of the Appellant at the time of the first transaction. These second and third transactions cannot be said to the 'preordained' particularly where these transactions were separated in time by nine years.

[19] It was submitted for the appellant that whilst the learned High Court judge had accepted the *Furniss* test that there must be a preordained series of transactions forming a simple composite transaction, she had erred when she relied on *WT Ramsay Ltd v Inland Revenue Commissioners; Eilbeck (Inspector of Taxes) v Rawling* [1981] 1 All ER 865 for the principle that in looking at tax avoidance scheme which comprised a number of specific transactions to avoid tax, the genuineness or otherwise of each individual step or transaction need not be looked at from each individual step or transaction but it is to be looked at as a whole. It was submitted that the learned High Court judge had erred

when she had looked at all the transactions on hindsight and said that there was a scheme. The proper way was for the learned judge to look at the scheme as it was in 1994 and see whether the activities contemplated then conformed with the scheme. Moreover, the learned judge had failed to consider the issue of whether the first, second and third transactions were all preordained and that there was no finding to this effect.

The respondent's case

[20] It was submitted for the respondent that the appellant is a property development company that buys land, develops the said land and sells them. The profits arising therefrom are business income and as such are subjected to the Act. The appellant had identified the land as being suitable for long term investments. It had intended to build shophouses and complex on it in its entirety or in units. It had also planned to build shophouses on another lot of land with the objective of leasing out the shophouses for a period of time prior to the sale.

[21] By a letter dated 8 October 1993 from Arthur Andersen, it appeared that the appellant had sought advice to minimise its tax. The salient paragraphs are extracted from the said letter and read as follows:

> Background
>
> We understand that the principal activity of Ibraco-Peremba Sdn. Bhd. (hereinafter 'the Company') is developing properties for resale. It intends to build shop-houses and a complex for renting out for a period of time before it sells the shop-houses and complex in its entirety or in units. The company has applied for approval to build the shop-houses and complex.
>
> The Company also plans to build shop-houses on another lot of land with the objective of leasing out the shop-houses for a period of time prior to sale.
>
> Against this background we have been requested to suggest an effective method of developing the properties to minimize the tax impact to the Company

[22] In the same letter there were two scenarios suggested by Arthur Andersen to minimise tax impact and the appellant had chosen Scenario B. The extract of Scenario B is reproduced below:

> Under this scenario, we have considered a structure which, if implemented, could result in the sales proceeds being treated as capital gains and hence, be subject to RPGT. That is, the lands will be transferred to a 100% realty company of Ibraco. Real property gains tax is payable on the market surplus of the lands. Stamp duty exemption should be available under Section 15A of the Stamp Act. As the developed properties will be held for rental for a relatively long period, say 5 years, there is a valid argument that the gain (or loss) of the investment properties is on capital account and subject to real property gains tax.

[23] Pursuant to Arthur Andersen's advice, the appellant had incorporated IPH which it owned wholly. The appellant then transferred the land to IPH. IPH then appointed the appellant by way of power of attorney (p 231, *RR Bahagian* C) to deal with the land. The appellant had also entered into the Turnkey construction agreement/contract ('the agreement') with IPH to develop the land (that is the project) in which the total development costs were to be borne by the appellant (fourth paragraph of the preamble and cl 4.6 of the agreement, pp 232 and 234, *RR Bahagian* C). The project was completed in 1996, after which the shophouses, shopping complex and office building were rented out and rental income was declared as IPH business income. The respondent then went on to detail out the various transactions entered into by the appellant and or its associated companies as seen from the facts found by the SCIT which we do not wish to repeat other than the following facts:

(a) when the appellant sold all its shares in IPH to Vendu for the sum of RM22.5m (pp 266–279, *RR Bahagian* C), Vendu had paid the appellant by way of 'Promissory Notes', which meant to say that there was no actual payment of the said sum was made then;

(b) after receiving the 'payment' through the 'Promissory Notes', the appellant had declared dividend in kind to its shareholders, namely Ibraco Bhd (RM13,599,754) and Permodalan Peremba Sdn Bhd (RM8,900,246) in its resolution at p 248, *RR Bahagian* C;

(c) in the Ibraco Peremba Holdings Sdn Bhd's resolution at p 249 of the *RR Bahagian* C, it could be clearly seen that IPH was to be voluntarily wound up; and

(d) based on the resolution at p 253, *RR Bahagian* C, Vendu too was to be voluntarily wound up.

[24] It was submitted by the respondent that the appellant's intention had remained the same throughout these various transactions, that is, to develop and dispose the properties. The setting up of IPH was merely a vehicle to defray such intention where IPH was fully controlled by the appellant and was without any expertise or funds to develop the properties. There was no commercial nor business reason to set up IPH except for the purpose of the scheme to avoid such disposal from being taxed under income tax. IPH and Vendu were formed for the purpose of disposing the said properties and after they had completed their tasks both had been voluntarily wound up by their shareholders. The effect of the whole scheme was that the profits from the disposal of the said properties went back to the appellant.

[25] The respondent submitted that from the facts, they clearly showed that the scheme adopted by the appellant did not fall within the meaning of organising its affairs so as to minimise tax. The scheme was a tax avoidance

scheme and it must fall within the scope of s 140 of the Act.

The decision

[26] Section 140 of the Income Tax Act 1967 reads as follows:

> 140 Power to disregard certain transactions
>
> (1) The Director General, where he has reason to believe that any transaction has the direct or indirect effect of —
>
> (a) altering the incidence of tax which is payable or suffered by or which would otherwise have been payable or suffered by any person;
>
> (b) relieving any person from any liability which has arisen or which would otherwise have arisen to pay tax or to make a return;
>
> (c) evading or avoiding any duty or liability which is imposed or would otherwise have been imposed on any person by this Act; or
>
> (d) hindering or preventing the operation of this Act in any respect,
>
> may, without prejudice to such validity as it may have in any other respect or for any other purpose, disregard or vary the transaction and make such adjustments as he thinks fit with a view to counteracting the whole or any part of any such direct or indirect effect of the transaction.

[27] The distinction between what is accepted and what is not in the way of reducing the amount of tax to be paid used to be conveniently described by the terms tax avoidance and tax evasion respectively. Section 140(1)(c) of the Act in particular, has the effect of demolishing that convenient description. The Act now empowers the Director General, without prejudice to such validity as it may have in any other respect or for any other purpose, where he has reason to believe that any transaction has the direct or indirect effect of evading or avoiding any duty or liability which is imposed or would otherwise have been imposed on any person by the Act, to disregard or vary the transaction and make such adjustments as he thinks fit with a view to counteracting the whole or any part of any such direct or indirect effect of the transaction. Thus the oft quoted words of Lord Tomlin in *Inland Revenue Commissioners v Duke of Westminster* [1936] AC 1 and quoted by Lord Templeman in *Commissioner of Inland Revenue v Challenge Corporation Ltd* that every man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Act is less than it otherwise would be is now only partially true, for whether he succeeds or not, according to s 140(1)(c), depends upon the determination of the Director General. We make the observation that it is for the taxpayer to demonstrate that the transaction or the arrangement by which the income was produced was so preordained by compliance with the requirements of law or accepted business practices to limit risk exposure, and that the tax savings were purely incidental.

[28] Other than the above all that remains solely at the taxpayer's discretion is 'tax mitigation', which as explained by Lord Templeman is not subject to the section because the taxpayer's tax advantage is not derived from an 'arrangement' but from the reduction of income which he accepts by reducing his income, or the higher expenditure which he incurs, or by incurring expenditure in circumstances in which the taxing statute affords a reduction in tax liability.

[29] After a careful perusal of the facts as found by the SCIT, and which we agree with the learned High Court judge's view that those findings of facts should not be disturbed (see *Chua Lip Kong v Director-General of Inland Revenue*'s case), the submissions of the parties as well as the documentary evidence, we are of the view that there is no error of law committed by the learned judge when she dismissed the apellant's appeal and affirmed the SCIT's deciding order.

[30] In this case it is quite clear that the advice of Arthur Andersen was obtained for the primary purpose of ordering the transactions in a manner to minimise tax. We find that based on the factual matrix of this case the learned High Court judge was not wrong in coming to her conclusion that the facts found by the SCIT showed that there was tax avoidance when the transactions entered into by the appellant through shell companies revealed the factual situation that the tax position was altered; that the SCIT found that the appellant had in fact implemented a scheme following the advice of the tax consultant in perpetuating one original intention of selling of the properties as it intended to do from the start.

[31] The learned High Court judge had referred to *WT Ramsay Ltd v Inland Revenue Commissioners; Eilbeck (Inspector of Taxes) v Rawling* [1981] 1 All ER 865; [1982] AC 300 (HL). for the principle that in looking at tax avoidance scheme which comprised a number of specific transactions to avoid tax, the genuineness or otherwise of each individual step or transaction need not be looked at from each individual step or transaction but it is to be looked at as a whole. As such the learned judge found there was no error committed by the SCIT to warrant intervention by her as there were evidence and facts to support the findings of the SCIT in arriving at the decision they did and hence justifying a case under s 140(1)(c) of the Act. We agree with her reasoning and conclusion.

[32] Contrary to the appellant's submission (that the second and third transactions could not be said to be 'preordained' particularly when these transactions were separated in time by nine years, based on the principle enunciated in *Furniss (Inspector of Taxes) v Dawson and related appeals* and endorsed by *Ensign Tankers (Leasing) Ltd v Stokes (Inspector of Taxes)*), we accept

the SCIT's findings of facts that the so-called second and third transactions were in discharge of the scheme advanced by Arthur Andersen in Scenario B as a way of avoiding tax by the appellant, the long passage of time notwithstanding. In any case, Scenario B did envisage a comparatively long period of time of about five years in its proposal before the properties could be disposed off. The passage of time is of little consequence in the scheme of things for the appellant when we take into account the findings of facts by the SCIT in para 2 above and the matters highlighted by the respondent in para 23 above. To this end, the fact that the tax advice given by Arthur Andersen was only discovered by the respondent in 2005 then becomes significant.

[33] For the reasons stated above, we therefore affirm the High Court judge's decision affirming the SCIT's decision that s 140(1)(a) of the Act applied to the appellant.

PENALTY UNDER S 113(2)

[34] The appellant had also raised the issue of whether or not the respondent was in error in subjecting the appellant to penalties under s 113(2) of the Act before the High Court, but which was not dealt with explicitly by the learned High Court judge. They also raised the same issue before us. Section 113 of the Act provides as follows:

> 133 Incorrect returns
>
> (1) Any person who —
>
> (a) makes an incorrect return by omitting or understating any income of which he is required by this Act to make a return on behalf of himself or another person; or
>
> (b) gives any incorrect information in relation to any matter affecting his own chargeability to tax or the chargeability to tax of any other person,
>
> shall, unless he satisfies the court that the incorrect return or incorrect information was made or given in good faith, be guilty of an offence and shall, on conviction, be liable to a fine of not less than one thousand ringgit and not more than ten thousand ringgit and shall pay a special penalty of double the amount of tax which has been undercharged in consequence of the incorrect return or incorrect information or which would have been undercharged if the return or information had been accepted as correct.
>
> (2) Where a person —
>
> (a) makes an incorrect return by omitting or understating any income of which he is required by this Act to make a return on behalf of himself or another person; or
>
> (b) gives any incorrect information in relation to any matter affecting his own chargeability to tax or the chargeability to tax of any other person,
>
> then, if no prosecution under subsection (1) has been instituted in respect of the

> incorrect return or incorrect information, the Director General may require that person to pay a penalty equal to the amount of tax which has been undercharged in consequence of the incorrect return or incorrect information or which would have been undercharged if the return or information had been accepted as correct; and, if that person pays that penalty (or, where the penalty is abated or remitted under Section 124(3), so much, if any, of the penalty as has not been abated or remitted), he shall not be liable to be charged on the same facts with an offence under subsection (1).

[35] The SCIT accepted the fact that by virtue of s 113(2) of the Act the imposition of the penalty by the respondent on the appellant was not mandatory but an exercise of a discretionary power. The SCIT cited the case of *Ketua Pengarah Hasil Dalam Negeri v Kim Thye & Co* [1992] 2 MLJ 708; [1992] 1 CLJ Rep 135 as their authority, where the Supreme Court quoted the High Court judge's statement with approval as follows (at p 712 (MLJ); p 141 (CLJ)):

> The learned judge found from s 113(2) a discretion vested in the Revenue, as to whether to impose or not, a penalty thereunder. His Lordship said:
>
> > ... He is given a discretion, a discretion which to my mind he cannot exercise at whim or fancy but after due consideration of all relevant facts and circumstances ...

The SCIT then alluded to the respondent's submission that the scheme was never communicated to the respondent and if there was no investigation carried out the scheme would never be discovered, whilst it was the appellant's submission that there was no holding of information since all the sales were duly reported and tax thereon paid. The SCIT nevertheless went on to find that the imposition of the penalty on the appellant was correct in law in the circumstances and that there was no good reason for them to intervene.

[36] Before us, the appellant submitted that the SCIT had:

(a) erred in their interpretation of s 113(2) in holding that 'good faith' was not a defence;

(b) failed to consider the fact that there was no withholding of information since all the sales were duly reported and tax thereon paid;

(c) assumed that the respondent had correctly exercised his discretion without any consideration on whether the penalty was fair and just; and

(d) even if the respondent was entitled to involve s 140 of the Act, the respondent was only entitled to make adjustments with the view to counter the transactions, there is no penalty provided in s 140 of the Act.

[37] For the respondent, it was submitted that from the facts proven and the evidence adduced, it was clear that there was a scheme executed by the appellant to alter the incidence of tax which was supposed to be paid by the appellant. If the scheme is ruled as unacceptable scheme, it was submitted that the appellant had furnished an incorrect return for failure to disclose all the proceeds from the disposal of the said properties and had given incorrect information in relation to the matter affecting its own chargeability to tax. That under s 113(2) of the Act, a penalty may be imposed when a person made an incorrect return or incorrect information. Further, the scheme was never communicated to the respondent and if there was no investigation carried out by the respondent, the scheme would never have been discovered. Therefore, failure to disclose such a scheme was an important consideration in the imposition of the penalty. Learned counsel for the respondent referred back to *Challenge Corporation Ltd* for the proposition that failure to inform all the facts relevant to an assessment can tantamount to tax evasion and not avoidance. In view of all the relevant facts and circumstances of the case, it was submitted that as the appellant had made an incorrect return and information to the respondent, the respondent was correct in imposing a penalty under s 113(2) of the Act.

The decision

[38] It is without doubt that s 113(2) of the Act gives a discretion to the respondent to impose a penalty on a person who has failed to observe the requirements of the law as provided in para 2(a) or (b) of s 113. Hence the use of the phrase 'the Director General may require that person to pay a penalty'. There is a clear distinction between sub-s 113(1) and sub-s 113(2). Although paras 113(1)(a) and (b) and paras 113(2)(a) and (b) are almost identical, but the effect of sub-s 113(1) is different from sub-s 113(2). Sub-section 113(1) provides for an offence being committed in the circumstance provided for in para (a) or (b) unless that person 'satisfies the court that the incorrect return or incorrect information was made or given in food faith'. Whereas sub-s 113(2) provides for a situation where there is no prosecution under sub-s 113(1) has been instituted in the circumstances provided for in para 113(2)(a) or (b), the Director General may require that person to pay a penalty. That being the case, the defence of 'good faith' as found in sub-s 113(1), and not found in sub-s 113(2), does not apply to the Director General's discretion under sub-s 113(2). We therefore disagree with the appellant's submission on this score.

[39] We also disagree with the appellant's submission that as s 140 of the Act did not provide for a penalty, the respondent was precluded from invoking it under sub-s 113(2). It is self evident that s 140 does not expressly nor impliedly exclude the operation of s 113. Section 140 gives the discretion to the respondent in certain circumstances and does not relate to a question of breach

by the appellant as such. Neither does the provisions of s 113 exclude its application in the circumstances provided for under s 140. Section 113 therefore operates in the circumstances stipulated therein independent of s 140. Hence we do not find the respondent had erred in invoking s 113(2) of the Act against the appellant. In not intervening with the respondent's decision to impose the penalty on the appellant, the SCIT had taken into consideration the respondent's submission that if not for the fact that an investigation had been carried out on the appellant and it had stumbled upon the Arthur Andersen's tax advice in 2005, the scheme would never have seen the light of day. In not intervening in the issue of penalty the learned High Court judge seemed to share the same view. We share the same view. We do not see the need to intervene. We also have in mind the provisions of s 17A of the Interpretation Acts 1948 and 1967 (Act 388) which require 'a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object'.

CONCLUSION

[40] For the reasons stated above, we unanimously agree that we see no merits in the appellant's appeal. We therefore dismiss the appeal with costs of RM10,000 to the respondent, unless otherwise agreed. We affirm the decision of the learned High Court judge when she affirmed the deciding order of the SCIT. Deposit is refunded.

Appeal dismissed with costs of RM10,000; decision of learned High Court judge affirmed.

Reported by Dzulqarnain Ab Fatar